IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 470

THE BOARD OF MANAGERS OF THE ARKANSAS TRAINING SCHOOL FOR BOYS AT WRIGHTSVILLE, THE BOARD OF MANAGERS OF THE ARKANSAS TRAINING SCHOOL FOR BOYS AT PINE BLUFF, and E. G. BROOKMAN, Juvenile Court Judge at Lincoln County, Arkansas, and ALL OTHER JUDGES SIMILARLY SITUATED, *Petitioners*

v.

MRS. NONA MAE GEORGE, on behalf of her minor son, ROY LEE LEWIS, and ON BEHALF OF ALL PERSONS SIMILARLY SITUATED, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND APPENDICES

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v.

MRS. NONA MAE GEORGE, on behalf of her minor son, ROY LEE LEWIS, and ON BEHALF OF ALL PERSONS SIMILARLY SITUATED, ... *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners, by their counsel, the Attorney General of the State of Arkansas, petition this Court and pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit affirming the United States District Court's denial of a motion to dismiss.

CITATIONS TO OPINIONS BELOW

The United States District Court did not publish an opinion as such, but merely declared that the petitioners' motion to dismiss be denied. The order has been reproduced as Appendix B, infra, beginning at page 17.

The opinion of the Court of Appeals for the Eighth Circuit is set forth at Appendix C, infra, commencing on page 19, but has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on May 23, 1967. A petition for rehearing was timely filed by petitioners and was subsequently denied on June 21, 1967. A motion for stay of mandate pending this application for writ of certiorari was then presented to the Court of Appeals and was granted on July 10, 1967.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Did the Court of Appeals exceed its authority and jurisdiction by expending the issue on an interlocutory appeal to reach a determination of the entire litigation on the merits?

2. Whether the decision of the Court of Appeals denied petitioners the opportunity to file an answer and the right to an evidentary trial?

3. Are the Arkansas statutes governing the administration and operation of an integral part of the State penal system such as to constitute a substantial federal question to entitle petitioners to a three-judge court as required by 28 U.S.C. §§2281 et seq.?

CONSTITUTIONAL PROVISION INVOLVED

This case presents an issue involving the Fourteenth Amendment to the Constitution of the United States.

ARKANSAS STATUTES INVOLVED

The statutory provisions involved in this petition are portions of Acts Numbered 398 and 400, Acts of Arkansas 1955, which have been codified in Arkansas Statutes Annotated as §§46-305 through 46-330. The pertinent sections are reproduced at Appendix A, infra, pp. 15.

STATEMENT

This cause was originally instituted in the United States District Court for the Eastern District of Arkansas on May 6, 1966, as a class action for Negroes committed to the Arkansas Training School for Boys at Wrightsville against the several county judges of Arkansas and the governing boards of the two reformatories maintained for boys. The respondent, Nona Mae George, commenced the suit alleging that her son, Roy Lee Lewis,[1] had been ordered to attend a reformatory after he had been determined to either be dependant or delinquent by the Lincoln County Court.[2] No appeal was taken from that order.[3]

The complaint alleged that separate training schools for white and Negro juveniles are maintained, and that the Boards of Managers of the separate facilities as well as the County Judges should be restrained and enjoined operating racially segregated training schools. It was further alleged that the institution to which white children are committed is not only superior to that of the Negro reformatory but that the General Assembly appropriates more money for the maintenance and financing of the facility to which white males are confined. For these reasons, it was urged that the county judges be enjoined from the further practice of discrimination.

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[1] No explanation appears in this record regarding the different surnames of the minor and his mother.

[2] The governing statute provides that the committment shall not disclose the reason the child is ordered to be incarcerated. Ark. Stat. Ann. §46-331 (1964 Repl.).

[3] Provision is made for appeals from the juvenile court to the circuit court by Ark. Stat. Ann. §45-208 (1964 Repl.).

The petitioners responded by a motion to dismiss asserting that the complaint failed to state a cause of action upon which the District Court could grant relief. In support of the motion, the petitioners contended that the two reformatories for male children in Arkansas were penal in fact and that the federal courts had announced a strong policy of non-interference in the affairs and administration of state penal institutions.

Finally, on August 3, 1966, a brief in opposition was submitted by the respondents and a hearing was held at that time. Although no evidence was offered by either of the parties, the district judge denied the motion to dismiss holding that the reformatories were educational in nature and jurisdiction existed to permit joining of the issues and proceeding to trial. Congnizant that the finding was based upon an arguable premise and that the determination of the issue might advance the ultimate termination of the litigation, an interlocutory appeal was permitted pursuant to 28 U.S.C. §1292 (b). The Court of Appeals for the Eighth Circuit was agreeable and granted leave to file the appeal. The United States made application through the Justice Department and was permitted to file its brief as amicus curiae in support of the position of the respondents urging that the ruling of the District Court be affirmed.

At the time of the hearing before the district court, and to the present, respondents have avoided the contention that any Arkansas Statute was unconstitutional. The petitioners had not yet filed an answer. No affidavits, exhibits or testimony were introduced at the hearing nor was the complaint verified.

During oral argument before the Court of Appeals, it was emphasized that circuit judges of Arkansas, who pos-

sess a like authority to commit juveniles as county judges, had not been made parties, that the complaint was deficient in several particulars and that the district judge's ruling was premature in view of the circumstances.

Unpersuaded, the Court of Appeals unanimously affirmed the decision of the district court and declared the applicable statutes invalid in part, ordering that the Boards of Managers prepare a plan of desegregation to be presented to the District Court for approval.[4] In passing, the Court of Appeals observed that other Arkansas Statutes governing the reformatories for girls was also unconstitutional.

A petition for rehearing was seasonably filed and denied. The Court of Appeals has stayed its mandate pending this application for certiorari.

REASONS FOR GRANTING THE WRIT

1. *The Court of Appeals Exceeded Its Authority*

Clearly, the Court of Appeals, confronted with a very narrow question through an interlocutory appeal of whether a district court possessed jurisdiction to grant relief in a controversy involving a state penal system, should not have undertaken to reach the merits of the entire case. The district court had merely considered petitioners' motion to dismiss and denied it declaring that the boys' reformitories were educational in nature. The correctness of that ruling was the sole question presented to the Court of Appeals for review and any enlargement was beyond the scope of review. In so doing,

[4] Fortunately, no injunction was adjudged against the petitioning county judges.

the Court of Appeals exceeded its obligation and authority.

It must be kept foremost that at this juncture, no answer had been filed to the complaint, and hence the issues had not been joined. Indeed, counsel for respondents, during the course of his argument before the district court opposing the motion to dismiss disclaimed any request for relief except to urge that the motion be denied and the petitioners required to answer.[5]

If it can be conceded that occasionally the Courts of Appeal dispose of all of the issues on interlocutory appeals provided by 28 U.S.C. §1292 (b), then it likewise must be agreed that those cases presented pecular factual circumstances which were ripe for adjudication at that early stage. *Smith* v. *Vulcan Iron Works,* 165 U.S. 518 (1897).

Moreover, the proposition which permits finality of a suit on an interlocutory appeal is qualified to exclude those instances where real constitutional questions are involved. *Mayo* v. *Lakeland Highlands Canning Co.,* 309 U.S. 310, 316 (1940); *Seagram Distillers Corp.* v. *New Cut Rate Liquors,* 221 F. 2d 815 (5 Cir. 1955). As stated in *Allen* v. *Omaha Live Stock Commission Co.,* 275 F. 1 (8 Cir. 1921):

> "If the complaint challenges the constitutionality of a legislative act, and also raises other questions of equitable cognizances, on which the action can be determined without passing on the constitutionality of the act, courts will not pass on it.

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[5] Mr. Walker, respondents' trial counsel stated: "What I am saying, Your Honor, is that what we are replying to today and all that we are replying to is the motion to dismiss, which does not cover the entire case. We are not now concerned with issues like whether or not the juvenile court has the authority to assign these persons or students to the Negro boys' school or the white boys' school — . . ." (R.17).

> Only when it is absolutely necessary will they pass upon a constitutional question (citing case). *And this applies with greater force on appeals from an interlocutory injunction granted on the complaint after a motion to dismiss has been denied and no answer tendered.*'' (Emphasis added)

Finally, an examination of those decisions which permit exceptional latitude on reviewing an interlocutory appeal, disclose accompanying records of proof by affidavits and other appropriate means. *Eagle Glass & Manufacturing Company* v. *Rowe*, 245 U.S. 275 (1917); *James* v. *Wild Goose Mining & Trading Company*, 143 F. 868 (Alaska 1906).

A challenge is offered to find any of these requisites in this abreviated record. The several issues are not ripe since no opportunity has been given to even announce much more join the issues by answer. There are bonafide constitutional questions supported by persuasive authority involved in this case. And there is no supporting proof whatsoever in the record on which to base the conclusions reached here by the Court of Appeals.

2. *The Decision of the Court of Appeals Deprived Petitioners of Their Right to Answer and a Trial.*

It has been mentioned previously that the Arkansas Statutes declared to be unconstitutional were not described or identified by the complaint not withstanding the district judge's frequent urgings and inquiry concerning this absense. It will also be recalled that since this was an interlocutory appeal, no answer had been filed by petitioners and no proof had been offered by either of the parties. Another fault, noted initially, is that the complaint only named the Boards of Managers and the county judges as defendants.

It was pointed out during the course of the oral presentation of this case before the Court of Appeals that the circuit judges of the State of Arkansas possessed the authority, and as a practical matter, are responsible for a substantial number, if not most, of the commitments of the juveniles to the state reformitories.[6] Inasmuch as the State of Arkansas was not made a defendant as such, no meaningful argument can be made that the suit would generally encompass all of the agents, officeholders and judicial officials of the State of Arkansas.

A careful reading of the opinion discloses that still other, statutes, which govern the operation of the girls' training schools, were declared void not withstanding that there was no intimation whatsoever by the pleadings or otherwise concerning this completely foreign subject. Indeed, this was accomplished by the Court of Appeals in spite of the obvious and compelling reasons relating to the incarseration, nuture, and training of female delinquents which are not applicable to male inmates.

It is submitted that the record on appeal, or more precisely, the lack of it, would prohibit the Court of Appeals from undertaking and reaching the decision announced. To reiterate, the statutes concerning the boys' reformitory were not mentioned, the statutes concerning the girls' training schools would not have been considered an issue, there was an absence of necessary parties, the issues had not been joined, no evidence had been taken on any subject, and review of appeal was limited to the ruling on the motion to dismiss.

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[6] In Arkansas, the circuit courts have original jurisdiction of felonies and both original and appellate jurisdiction of misdemeanors. Ark. Stat. Ann. §43-1405. Thus, minors convicted of crime, identified as delinquents, as opposed to dependants, would consequently be committed by circuit judges in most instances.

3. *The Arkansas Statutes Governing the Operation Of the State Boys' Reformatories Present Substantial Questions.*

A. The Statutes were not challenged in the complaint.

Perhaps the most critical aspect of the Court of Appeals' ruling favoring the position of the respondents is the fact that the statutes declared unconstitutional in part were *not* specifically identified nor challenged by respondents in their complaint. The failure of counsel for respondents to satisfy this deficiency of pleading cannot be excused as either oversight or in artful pleading. During the hearing on the motion to dismiss, the matter was directed to the attention of respondents' counsel on nine separate instances by the district judge. (See pp. 12, 13, 14, 16, 20, 21 and 22 of the printed record). The answer of the attorney to these pointed questions of why the act was not specifically challenged was unsatisfactory at the most. For whatever purposes respondents had in mind, the fact remains that they rejected the opportunity to ask leave to amend the complaint to assert the invalidity of the statutes although this could have been easily accomplised within the framework of the rules of civil procedure.

It should be fair to state that respondents and their counsel purposely did not interject a direct attack urging the unconstitutionality of certain Arkansas statutes. Their highly qualified and very experienced counsel was assuredly aware that had the validity of a state statute been questioned, the petitioners would have responded by requesting that a three-judge court be convened to resolve this most important issue.[7] At the very least, petitioners

[7] This argument is developed further at sub topic C, post.

would not have been deprived of this opportunity to interject this protective measure which has been provided by the Congress of the United States.

B. The Statues present real and substantial constitutional issues.

The Court of Appeals observed and remarked in its opinion, that the General Assembly had expressly designated the two reformatories as educational institutions. See Ark. Stat. Ann. §§46-305, 46-321. A following paragraph discloses the purpose of the language was to enable the facilities to participate in federal programs of financial assistance. See Acts 398 and 400, Section 17 and 16 respectively, Acts of Arkansas, 1955.

Another statute prohibits publication of the names of inmates, or a description of their crimes, etc. Ark. Stat. Ann. §45-205 (1964 Repl.). Obviously the purpose of these provisions are to avoid the stigma of a convicted criminal.[8]

It cannot be forgotten however, that the reformatories are strictly penal with prohibitions of escape,[9] provisions for parole[10] and the like. The fact that education of inmates is a legitimate concern, is just that and nothing more. Most important, age is a determinate for confinement at the State Penitentiary. Ark. Stat. Ann. §46-308 and §46-332.

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[8] Ark. Stat. Ann. §46-318 and §46-340, each prohibit the commitment from being introduced in evidence in any court.

[9] Ark. Stat. Ann. §§46-316 and 46-338.

[10] Ark. Stat. Ann. §§46-313 and 46-355.

The facilities maintained in Arkansas for the confinement and rehabilitation of minors is a most important and integral part of the state penal system.

C. Petitioners are entitled to be heard by a three-judge court.

The composure of the suit before the district court in reference to the absence of a statutory challenge did not materially affect the rights and nature of the defense upon which petitioners would have defended their suit in the event the motion to dismiss was denied. Nor did the ruling of the district court prevent petitioners from interjecting the genuine issues by answer. However, the course taken by the Court of Appeals in their decision resulted in a devistating and unprecidented ruling which deprived petitioners of the procedure enacted by the Congress requiring convening of the three-judge court to examine the unconstitutionality of a state statute.

The implications of the ruling of the Court of Appeals cannot be described less enthusiastically nor can the deprevation of a trial be stated more clearly.

The history and the compelling reasons which prompted the Congress to enact and provide the safeguards of the three-judge court need not be repeated here. And the urgings of respondents to the contrary is unpursuasive.

In the Court of Appeals, it was argued that a three-judge court would not have been required even if the statutes had been attacked directly, in view of the proposition that settled matters do not require repeated review by a three-judge court. The Court of Appeals agreed and relied upon several familiar decisions. An

examination of those authorities however reveals that none are quite analogous to the situation at bar. Certainly, statutes governing an area of the state's penal institutions are easily distinguishable from the use of a public park, attendance in a public school or use of a public commercial transportation. There have been no cases that petitioner has been able to discover which have announced in unequivocal terms that statutes requiring restrictions of intermingling of races within a state penal institution are unconstitutional. To the contrary, several of the circuits have announced divergent views when confronted with similar situations.[11]

In general, the federal courts have been extremely cautious to consider any question pertaining to the administration of either the federal or state penal systems.

It is submitted therefore, that the questions presented in this case are genuine and fresh. There has been no established doctrine or consistent pronouncement which would remove this case from the three-judge category. At the very least, petitioners should have been given the opportunity to raise the issue rather than the Court of Appeals perfunctorily deposing of it.

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[11] Compare: **Lee v. Tahash**, 352 F. 2d 970 (1965), **Harris v. Settle**, 322 F. 2d 908 (1963), **Williams v. Steel**, 194 F. 2d 32 (1952) of the 8th Circuit; **United States v. WENR** 209 F. 2d 105 (1953) **Kelly v. Dowd**, 140 F. 2d 81 (1944), of the 7th Circuit; **Roberts v. Pegelow**, 313 F. 2d 548 (1963), **Bolden v. Pegelow**, 329 F. 2d 95 (1964) of the 4th Circuit and **Singleton v. Board of Commissioner**, 356 F. 2d 771 (1966) from the 5th Circuit. See also **Nichols v. McGee**, 169 F. Supp. 721 (N.D. Calif. 1959) and **Edward v. Sand**, 250 F. Supp. 977 (Va. 1966).

CONCLUSION

In view of the status of the record here, the very most that the Court of Appeals could have properly accomplished was to affirm the finding of the district court. The case would have then been remanded, requiring that petitioners answer the complaint. At that time, a trial would have been conducted and all procedural safeguards would have been observed. The petitioners would have been afforded the opportunity to present their argument for convening a three-judge court and offering their evidence on the issues. In its present state, the decision of the Court of Appeals is clearly repugnant to the traditional concepts of judicial procedure.

It is urged that certiorari be granted to the end that the decision of the Court of Appeals be reversed in all particulars and the complaint of the respondents dismissed, or in the alternative that the decision of the Court of Appeals be affirmed as to the narrow issue presented by the motion to dismiss and the case remanded to the district court for trial.

Respectfully submitted,

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August, 1967

APPENDICES

APPENDIX A

Arkansas Statute Section 46-301

Names of training schools. — Hereafter, (a) the Arkansas Boy's Training School shall be known as the "Arkansas Training School for Boys at Pine Bluff," (b) the Negro Boys' Industrial School shall be knows as the "Arkansas Training School for Boys at Wrightsville," (c) the Arkansas Training School for Girls shall be known as the "Arkansas Training School for Girls at Alexander," and (d) the Fargo Training School shall be known as the "Arkansas Training School for Girls at Fargo." Provided, that nothing contained in this section shall be so construed as to alter the membership, or the functions, powers and duties, of the Boards of Managers of the respective said schools, and all appropriations of funds at any time made for the operation, maintenance and improvement of the respective said schools under their former names shall be deemed to be appropriations made under the new names set forth herein. [Acts 1963, No. 515, §1, p. 1602]

Arkansas Statute Section 46-305

Nature of institution. — It is hereby declared to be the purpose of this Act [§§46-305 - 46-318] that hereafter the Boys' Industrial School of the State of Arkansas [Arkansas Training School for Boys at Pine Bluff] be deemed a training and educational institution, and shall be entitled to all the rights and privileges of any other accredited educational institution of this state. It is further the purpose of this Act to declare that the Boys' Industrial School [Arkansas Training School for Boys at

Pine Bluff] is not, and shall not be a part of the penal system of the State, nor shall it be construed as a penal institution. [Acts 1955, No. 398, §1, p. 1032.]

Arkansas Statute Section 46-306

Commitment of delinquent boys. — Any white male child under 18 years of age who has or shall be legally adjudged to be a delinquent or neglected juvenile as defined by law may be committed to the Boys' Industrial School [Arkansas Training School for Boys at Pine Bluff] by any juvenile or circuit court having jurisdiction over said juvenile. The order of commitment shall be for an indefinite period but in no case shall a child be retained in the School after he reaches majority. [Acts 1955, No. 398, §2, p. 1032.]

Arkansas Statute Section 46-321

Nature of institution. — It is hereby declared to be the purpose of this Act [§§46-321, 46-326 - 46-329] that hereafter the Negro Boys' Industrial School of the State of Arkansas [Arkansas Training School for Boys at Wrightsville] be deemed a training and educational institution, and shall be entitled to all the rights and privileges of any other accredited educational institution of this State. It is further the purpose of this act to declare that the Negro Boys' Industrial School [Arkansas Training School for Boys at Wrightsville] is not, and shall not be a part of the penal system of this State, nor shall it be construed as a penal institution. [Acts 1955, No. 400, §1, p. 1044.]

Arkansas Statute Section 46-330

Commitment by juvenile or circuit court. — Any colored male child under eighteen (18) years of age who

has or shall be legally adjudged to be a delinquent or dependent juvenile as defined by law may be committed to the Negro Boys' Industrial School [Arkansas Training School for Boys at Wrightsville] by any juvenile or circuit court having jurisdiction over said juvenile. The order of commitment shall be for an indefinite period but in no case shall a child be retained at the School after he reaches majority. However, only such dependent children may be committed to said School as in the opinion of the court cannot be placed in a good home. [Acts 1955, No. 400, §3, p. 1044.]

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

MRS. NONA MAE GEORGE, on behalf of her minor son, ROY LEE LEWIS, and on behalf of all other persons similarly situated, *Plaintiff*

Vs. No. PB 66 C-33

THE BOARD OF MANAGERS OF THE ARKANSAS TRAINING SCHOOL FOR BOYS AT WRIGHTSVILLE; THE BOARD OF MANAGERS OF THE ARKANSAS TRAINING SCHOOL FOR BOYS AT PINE BLUFF; and E. G. BROCKMAN, Juvenile Court Judge of Lincoln County, Arkansas, and all other Juvenile Court Judges similarly situated, *Defendants*

ORDER

This cause came on for hearing on August 3, 1966, on defendants' motion to dismiss the action on the basis

that the complaint fails to state a claim against defendants upon which relief can be granted; and

It appearing that this is an action in equity pursuant to the provisions of Title 28 U.S.C. Sec. 1343 (3) (4) effecting the rights, privileges and immunities under the due process and equal protection clause of the Fourteenth Amendment to the Constitution of the United States; and

It appearing that the defendants' motion to dismiss the action is based entirely on the contention that the Arkansas Training School for Boys at Wrightsville and the Arkansas Training School for Boys at Pine Bluff are "deemed penal institutions"; and

It further appearing that the Statutes of Arkansas, Ark. Stat. Anno. Sec. 46-305 and Sec. 46-321, provide affirmatively that these schools are "training and educational" institutions; and

The Court having heard the argument of counsel, and being fully advised, it is therefore,

ORDERED that the defendants' motion be denied.

The Court, however, is of the opinion that this interlocutory order involves a controlling question of law as to which there is substantial grounds for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. Pursuant to 28 U.S.C.A. §1292 (b), it is

ORDERED that proceeding in this cause by stayed, defendants being given ten days from the date of the entry of this order to make application for an appeal to the Court of Appeals for the Eighth Circuit.

Dated this 19th day of August, 1966.

/s/ Oren Harris
United States District Judge

Filed of record on August 11, 1966.

APPENDIX C

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 18,536

The Board of Managers of the Arkansas Training School for Boys at Wrightsville, et al,
Appellants,

v.

Mrs. Nona Mae George, et al,
Appellees.

Appeal from the United States District Court for the Eastern District of Arkansas.

[May 23, 1967.]

Before MATTHES, LAY and HEANEY, Circuit Judges.

LAY, Circuit Judge.

This action comes to us as an interlocutory appeal under Tit. 28 U.S.C. §1292(b), from an order overruling appellants' motion to dismiss. The district court granted the appeal since our decision may advance the ultimate termination of the litigation. We granted leave to file the appeal and have heard oral arguments from the respective parties.

Plaintiffs, Mrs. Mona Mae George and her minor son, Roy Lee Lewis, are Negro citizens who reside in Gould, Lincoln County, Arkansas. The complainants seek relief under the Civil Rights Statutes, 28 U.S.C. §1981 and §1983. The suit was brought as a class action for all persons similarly situated pursuant to Fed. R. Civ. P. 23(a)(3). An interlocutory and permanent injunction under Tit. 28 U.S.C. §1343(3) and (4) is sought against the respective Board of Managers of the Arkansas Training School for Boys at Wrightsville and at Pine Bluff from the maintenance of a separate "training" school for white and Negro juveniles. Similarly, an injunction is sought against Lincoln County, Juvenile Court Judge, E. G. Brockman and all other "juvenile court" judges similarly situated from assigning or sentencing minor Negro juveniles to the Training School at Wrightsville on the basis of race or color.

The two training schools, Wrightsville, known as the Negro Boys Industrial School, and Pine Bluff, known as the White Boys School, are set up and operated pursuant

to §46-301-360 of the Arkansas Statutes Annotated. Relevant portions of the Arkansas Statutes[1] read as follows:

Section 301:

"*Names of training schools.*—Hereafter, (a) the Arkansas Boys' Training School shall be known as the 'Arkansas Training School for Boys at Pine Bluff,' (b) the Negro Boys' Industrial School shall be known as the 'Arkansas Training School for Boys at Wrightsville,' . . . "

Section 305:

"*Nature of institution.*—It is hereby declared to be the purpose of this Act [§§46-305--46-318] that hereafter the Boys' Industrial School of the State of Arkansas [Arkansas Training School for Boys at Pine Bluff] be deemed a training and educational institution, and shall be entitled to all the rights and privileges of any other accredited educational institution of this state. It is further the purpose of this Act to declare that the Boys' Industrial School [Arkansas Training School for Boys at Pine Bluff] is not, and shall not be a part of the penal system of this State, nor shall it be construed as a penal institution."

Section 306:

"*Commitment of delinquent boys.*—Any white male child under 18 years of age who has or shall be legally adjudged to be a delinquent or neglected juvenile as defined by law may be committed to the Boys' In-

[1] Arkansas likewise maintains a similar segregated system of training schools for girls, one known as the Training School for Girls at Alexander for white girls, and the other is Fargo Training School for Negro girls. Ark. Stats. Anno. §§46-366 to 46-385. Although we have no jurisdiction over the girls' facilities under §§46-366 to 46-385, it is similarly obvious that these provisions do not conform to constitutional standards.

dustrial School [Arkansas Training School for Boys at Pine Bluff] by any juvenile or circuit court having jurisdiction over said juvenile. The order of commitment shall be for an indefinite period but in no case shall a child be retained in the School after he reaches majority."

Section 321:

"*Nature of institution.*—It is hereby declared to be the purpose of this Act [§§46-321, 46-326--46-329] that hereafter the Negro Boys' Industrial School of the State of Arkansas [Arkansas Training School for Boys at Wrightsville] be deemed a training and educational institution, and shall be entitled to all the rights and privileges of any other accredited educational institution of this state. It is further the purpose of this act to declare that the Negro Boys' Industrial School [Arkansas Training School for Boys at Wrightsville] is not, and shall not be a part of the penal system of this State, nor shall it be construed as a penal institution."

Section 330:

"*Commitment by juvenile or circuit court.*—Any colored male child under eighteen (18) years of age Who has or shall be legally adjudged to be a delinquent or dependent juvenile as defined by law may be committed to the Negro Boys' Industrial School [Arkansas Training School for Boys at Wrightsville] by any juvenile or circuit court having jurisdiction over said juvenile. The order of commitment shall be for an indefinite period but in no case shall a child be retained at the School after he reaches majority. However, only such dependent children may be committed

to said School as in the opinion of the court cannot be placed in a good home."

Commitment to one school or another is limited to adjudication of a juvenile being "dependent or delinquent." Plaintiffs allege that Roy Lee Lewis was adjudged by Judge Brockman to be delinquent and was sent to the "Negro Boys School." The commitment was pursuant to "the state law" above set forth.

It is alleged that plaintiffs have been deprived of their equal right to equal treatment, privileges and opportunities by the State of Arkansas solely because of their race or color; it is alleged these rights are in violation of the due process and equal protection clauses of the Fourteenth Amendment.[2]

Appellants assert that the statutes of Arkansas cannot be properly attacked in the present proceeding since (1) they are not pleaded or specifically attacked in plaintiffs' complaint, and (2) they cannot be declared unconstitutional without involving a three-judge court under Tit. 28 U.S.C. §2281.

Rule 8(f) Fed.R.Civ.P. requires us to construe "all pleadings . . . to do substantial justice." The complaint alleges that the Arkansas juvenile judges have acted pursuant to "state law." The complaint thus necessarily incorporates the statutes by reference. Likewise, the motion

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[2] Plaintiffs likewise allege:

"The Arkansas Boys' Training School at Pine Bluff operated for white delinquent or dependent juveniles offers and afford grossly superior facilities, rehabilitation programs, opportunities, etc., to those offered and afforded at the Negro Boys' Training School.

"The Arkansas Legislature appropriates far greater amounts of money, on a per pupil basis, for the operation of the white boys' Training School than it does for the Negro Boys' Training School."

to dismiss raises the validity of the statutes since appellants rely on the statutes in their brief to support their motion. Cf. *Bynum* v. *Schiro,* E.D. La., 219 F.Supp. 204. It would clearly be a "contradiction of reason" to attempt to enjoin the state from enforcement of a statute and at the same time not pass upon the constitutionality of the statute. Cf. *United States* v. *Tarumianz,* 3 Cir., 242 F.2d 191. Moreover it is not necessary to attack statutes by specific pleading which on their face are unconstitutional. *Turner* v. *City of Memphis,* 369 U.S. 350.

We are also mindful that the present appeal comes to us on a motion to dismiss with a limited record. Appellant has not even filed its answer. We adhere to the proposition that it would be improper to consider "grave constitutional questions" where there exists "reasonable likelihood" that further proceedings could help clarify the issues. *Borden's Co.* v. *Baldwin,* 293 U.S. 194, at 213. However, in the present proceeding no further pleadings or evidence is necessary for "refinemnt or clarification of issus." *United States* v. *Petrillo,* 332 U.S. 1; *United States* v. *Fabro, Inc.,* M.D. Ga., 206 F.Supp. 523. And we should dispose of all controversies "as expeditiously as is consistent with proper judicial administration." *Turner* v. *City of Memphis,* 369 U.S. 350.

Section 2281 requiring a three-judge court is not mandatory where the statute invokes clear governmental discrimination. *Bailey* v. *Patterson,* 369 U.S. 31. Segregation of public institutions or facilities is no longer a substantial constitutional question. *United States* v. *Guest,* 383 U.S. 745, see n. 6 at 754; *Johnson* v. *Virginia,* 373 U.S. 61.

However, it is initially urged that appellees have not stated a claim for relief since the Arkansas training

schools are not "educational" but "penal" institutions, and therefore the "policy" of federal court non-interference with "penal" institutions should be applied.

Although we do not base our decision upon a determination that these training schools are educational institutions, we only comment that it is the legislative declaration of the Arkansas people that these schools are not to be considered as "penal" in nature. Ark. Stats. Anno. §§46-305, 46-321.[3] By legislative fiat these schools are an integral part of the educational system in the State of Arkansas. Their responsibilities are equal to any other public institutions of learning in educating young people to assume useful roles in society. " . . . In the field of public education the doctrine of 'separate but equal' has no place.

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[3] Section 17 of Acts 1955, No. 398, p. 1032:

"It has been found and is declared by the General Assembly of the State of Arkansas that the Boys' Industrial School of this State is a training and educational institution for juveniles of this State; that the present law includes this School as a part of the penal system of this State; that such a continued status is detrimental to the welfare of the juveniles of this State; and, further, that such a status prohibits the School from receiving needed assistance from the Federal Government which it can obtain if classified and treated as an educational institution; and that this Act is necessary to alter and define the status of the Boys' Industrial School. Therefore, an emergency is declared to exist, and this Act being necessary for the preservation of the public peace, health and safety, it shall take effect and be in full force and effect from and after the date of its passage and approval."

Section 16 of Acts 1955, No. 400:

"It has been found and is declared by the General Assembly of the State of Arkansas that the Negro Boys' Industrial School of this State is a training and educational institution for juveniles of this State; that the present law includes this School as a part of the penal system of this State; that such a continued status is detrimental to the welfare of the juveniles of this State; and, further, that such a status prohibits this School from receiving needed assistance from the Federal Government which it can obtain if classified and treated as an educational institution; and that this Act is necessary to alter and define the status of the Negro Boys' Industrial School. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, it shall take effect and be in full force and effect from and after the date of its passage and approval."

Separate educational facilities are inherently unequal." *Brown* v. *Board of Education,* 347 U.S. 483, at 495.

However, to adopt the appellants' pernicious brand that these institutions are "penal" in nature leads nowhere. Penal institutions are public institutions and are not exempt from constitutional limitations. *Cooper* v. *Pate,* 378 U.S. 546. Our holdings in *Lee* v. *Tahash,* 8 Cir., 352 F.2d 970, and *Harris* v. *Settle,* 8 Cir., 322 F.2d 908, do not authorize discrimination in violation of constitutional prohibitions.

Wholesale and arbitrary discrimination by state statutes is far removed from disciplinary administrative matters by prison officials.[4] As was stated in the recent decision of *Washington* v. *Lee,* M.D. Ala., 263 F.Supp. 327, at 331:

> " . . . In this regard, this Court can conceive of no consideration of prison security or discipline which will sustain the constitutionality of state statutes that on their face require complete and permanent segregation of the races in all the Alabama penal facilities. We recognize that there is merit in the contention that in some isolated instances prison security and discipline necessitates segregation of the races for a limited period. However, recognition of such instances does nothing to bolster the statutes or the general practice that requires or permits prison or jail officials to separate the races arbitrarily. Such

[4] The Director of the United States Bureau of Prisons issued the following policy statement on February 7, 1966:

> "The policy of non-discrimination and full integration in Bureau of Prisons institutions is clear and of long standing. The policy applies to all aspects of institutional management relating to inmates and personnel." Bulletin 1001.1, Bur. of Prisons.

statutes and practices must be declared unconstitutional in light of the clear principles controlling."[5]

See, also, *Singleton* v. *Board of Comms. of State Institutions,* 5 Cir., 356 F.2d 771; *Bolden* v. *Pegelow,* 4 Cir., 329 F.2d 95; *Dixon* v. *Duncan,* E.D. Va., 218 F.Supp. 157; *Ferguson* v. *Buchanan,* S.D. Fla., 10 R.R.L.R. 795 (1965). See also, *Edwards* v. *Sard,* D.D.C., 250 F.Supp. 977.

To the extent that §§46-301--46-360 of the Arkansas statutes require segregation of juveniles to white schools or colored schools, based solely upon the race of the individual involved, the statutes are clearly unconstitutional; to the extent that the statutes require commitment to segregated facilities, they are clearly unconstitutional; to the extent that the statutes require maintenance of segregated facilities they are clearly unconstitutional. No injunction need issue to an individual judge,[6] board manager or any other person in light of our holding at the present time. The statutes are not void in their entirety and commitment of juveniles for dependency and delinquency may still be enforced thereunder. However, under no circumstance should race become a determinative factor in assignment. All children, white or colored, must be assigned to either school *in accordance with any approved plan of desegrega-*

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[5] Maryland's training school statutes were 'primarily geared . . . toward educational objectives rather than toward custody . . . ; Segregation declared unconstitutional under Maryland law. **Myers v. State Board of Public Welfare, et al,** Md. 1960, Cir. Ct. of Balt. City, 20 Md. L. Rev. 375 (1960), affirmed **State Board of Public Works, et al v. Robert Myers,** 167 A. 2d 765. For an interesting discussion of the problems and solutions in integrating the Maryland training schools see, Manella, **Racially Integrating A State's Training Schools,** Children, March-April 1964 (p. 49-54) (United States Government Printing Office, Washington, D. C.)."

[6] In Arkansas both County and Circuit Judges may make the commitment of any juvenile under the statutes. Even though Circuit Judges are not joined as a class, the invalidity of the statutes makes discussion of this problem moot.

tion. The Board of Managers shall prepare a plan for desegregation of the facilities and present it to the district court for approval. Such plan should be filed within a reasonable time as set by the district court and should set forth a reasonable time within which said institutions will become completely desegregated. The trial court shall retain jurisdiction until the segregation plans have been fulfilled.

Judgement is affirmed, the case is remanded for further proceedings in accordance with this opinion.

A true copy.

Attest: —

Clerk, U. S. Court of Appeals, Eighth Circuit.